

SEP 26 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

NO. 89-315

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

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MICHAEL S. ROBERTSON,  
Petitioner

V.

GASTON SNOW & ELY BARTLETT,  
Respondent

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE  
SUPREME JUDICIAL COURT OF THE  
COMMONWEALTH OF MASSACHUSETTS

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REPLY BRIEF

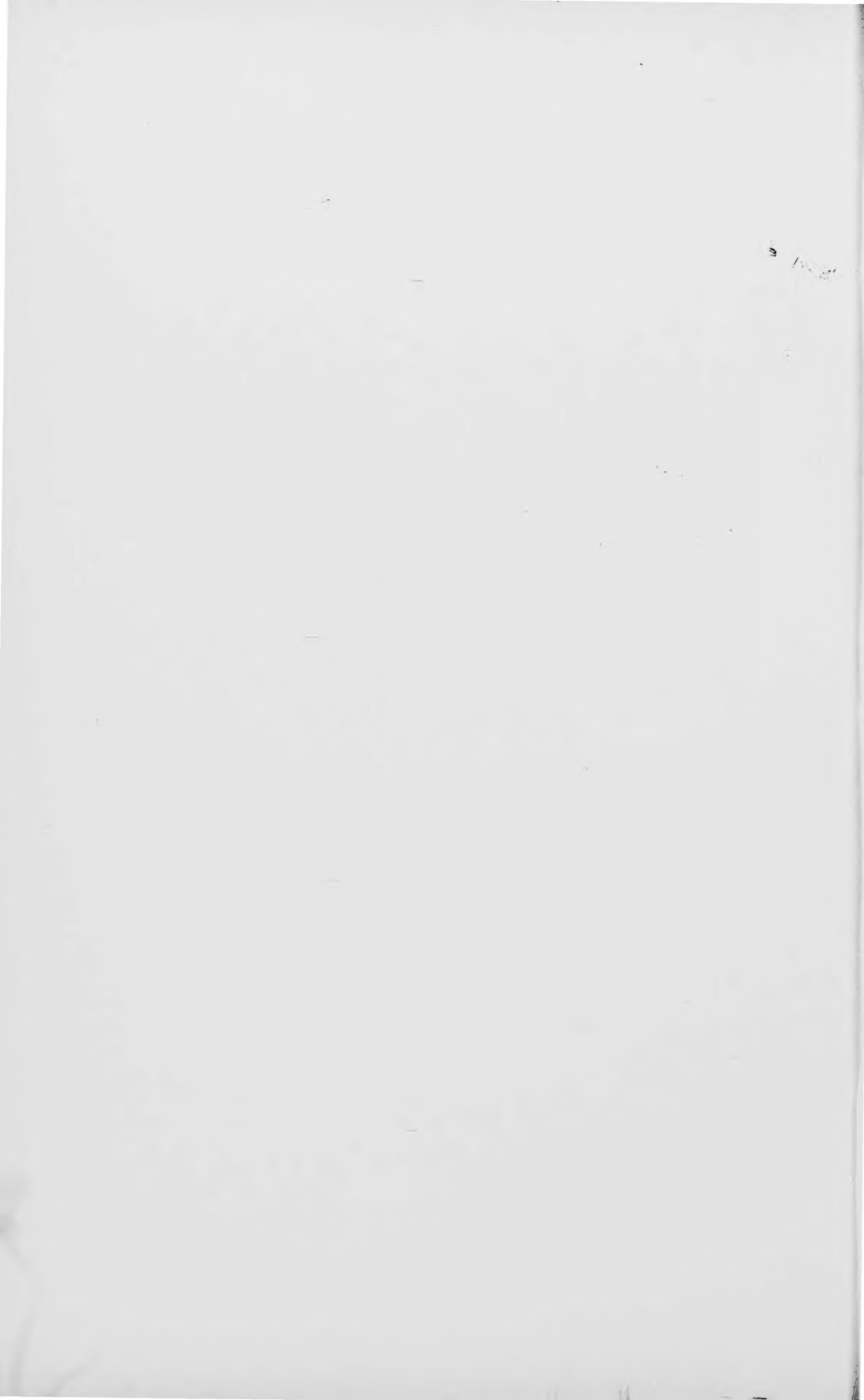
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## REPLY BRIEF

Several incorrect statements of fact and invalid arguments are contained in the brief in opposition. They must be corrected, lest the Court be misled and the cleanly focussed error presented be made to appear less stark or even questionable.

1. There was no "final argument" - The brief in opposition would have the Court believe that there was a comprehensive "final oral argument" before the trial judge (ps. 2, 5, 8 and 9). (A similar implication is contained in the state court's opinion [App. 4-5; 26, n. 7].) Aside from the fundamental fact that there cannot be any constitutionally meaningful "final argument" after final decision, the argument which was had was not comprehensive at all. Counsel argued only for "the narrower matter" of some altered or additional findings and rulings "only for appellate record purposes", which correction



was also made in his Petition For Rehearing below (App. 38-39, n. 1).

2. There was no "de novo review" - On each of the first seven pages of its brief in opposition the respondent states that the Supreme Judicial Court conducted a "de novo review" of the trial evidence and "made factual findings." That is even procedurally doubtful, but, substantively, most incorrect. The court said it was "unnecessary for us to decide if in appropriate circumstances we might depart from the 'clearly erroneous' standard...because, even if we apply the de novo standard, we reach the same conclusions as the trial judge" (App. 25-26). The court then summarized its concurrence on the three most relevant facts, but it does not make "factual findings" in any comprehensive way.

More importantly, and substantively, if the court's "summarized" "relevant evidence" (App. 6-13) be considered to be its "factual



findings" on "de novo review", they are "aberrant" and "skewed" in that the court "totally ignores most of the plaintiff's compelling evidence." Petitioner pointed that out to the Court (Petition at 11, n. 5), referencing the evidentiary delineation of that surprising oversight in argument 2. in the Petition For Rehearing (App. 42-45). Patently, there was no "de novo review" in any meaningful sense (even if any such appellate review were constitutionally relevant, which it is not). As petitioner "[q]uite frankly", but quite accurately, argued in his Petition For Rehearing, "measured against the actual record evidence, the court's summary would constitute unfair, result-oriented, advocacy, much less a judicial presentation" (App. 42).

3. There is no "independent state ground" - The state court did "reach the federal constitutional question" by ruling that its purported "de novo review" cured



the trial judge's denial of final argument (App. 26, n. 7). No appellate court can "not reach" a per se constitutional error presented such as this, of course. The Massachusetts Supreme Judicial Court implicitly "appli[ed] the harmless error rule of Chapman v. California", an invalid prophylactic to a "per se rule", as the Sixth Circuit correctly held in Patty v. BordenKircher, 603 F.2d 587 at 589 (6th Cir. 1979).<sup>1</sup> The court's attempt to make "de novo review" vitiate this per se error does not construct an "independent state ground" to preclude this Court's review.<sup>2</sup>

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<sup>1</sup>The Supreme Judicial Court did say in the cited footnote 7 (App. 26) that it was not "deciding whether" there were "a deprivation of due process" ("since our review of the case is, in effect, de novo"), but, of course, it was "deciding...due process" by the very fact that it refused to recognize that this "per se" constitutional error mandated a new trial. The court's supposed de novo review cannot excuse that error, as a matter of constitutional law.

<sup>2</sup>Respondent's citation of this Court's opinions (p. 7), far from supporting its contention that there is an "adequate and independent state ground" in this case, demonstrates that there is not. This



It does not because it cannot. This error is "irremedial", as this Court made plain in Herring v. New York, 422 U.S. 853 (1975). As all courts have since recognized (as did the Herring dissenters), Herring, changed the law; a new trial is the only remedy when final argument is denied.

4. This "per se error" applies to civil cases - The petition demonstrates (ps. 13-18) that this "per se error" clearly applies to both civil and criminal cases, but respondent cites (p. 8, n. 3) what it represents is "the long line of cases holding that final oral argument in a non-jury civil case is not an absolute right", and, impliedly, its denial not "per se error" in

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Footnote 2 continued

is made plainest in the most recent case cited: in Harris v. Reed, \_\_\_ U.S. \_\_\_, 109 S.Ct. 1038 (1989), the Court reviewed the case law and ruled, on page 1042, quoting from Michigan v. Long, 463 U.S. 1032 (1983), "this Court may reach the federal question on review unless the state court's opinion contains a ' "plain statement" that [its] decision rests upon adequate and independent state grounds'." Here there was no such "plain statement" and the "de novo review" construct is neither "adequate" nor "independent."



a civil non-jury trial. None of those cases (eight state cases and one 1959 Court of Appeals case) may stand, of course, against this Court's explicit opinions to the contrary, most particularly, since Herring v. New York, supra. All nine of respondent's cases turn on the fact that oral argument was denied at a non-jury trial and all of them pre-date Herring, which held, of course, that the due process right to make final argument does apply to non-jury trials.<sup>3</sup>

Herring changed the law; the non-jury distinction no longer exists. All appellate courts have specifically recognized that. The petition cites (p. 22) as an example, Commonwealth v. Miranda, 22 Mass.App.Ct. 10

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<sup>3</sup>One of respondent's cases, City of Corpus Christi v. Krause, 584 S.W. 2d 325 (Tex. Cir. App. 1979), was decided four years after Herring, but the issue was not argued as constitutional error, Herring was not cited, and the brief passing treatment of the question was disposed of with the citation of one 1910 Texas case. The citation is exemplary of how meaningful is respondent's "long line of cases." None of the nine cases treats the issue in a constitutional law context, and most but very briefly.



490 N.E. 2d 1195 (1986), ironically, one of the more scholarly opinions recognizing Herring's comprehensive new rule of law that even in non-jury cases the denial of final argument is "irremedial" error. To the same effect, also, see Eg. People v. Dougherty, 102 Cal. App. 3d 270 (Cal. Crt. App. 1986) (the "pre-Herring cases...are no longer controlling authority"); State v. Gilman, 489 A. 2d 1100 (Me. 1985) (overruling contrary precedent on the authority of Herring: "we now hold that the denial of the right to present summation [at a jury or non-jury trial] is per se prejudicial").<sup>4</sup>

Respondent's final citation (p. 9) of Woodbury v. Pfliiger, 309 N.W. 2d 104 (N. D. 1981), remains to be disposed of. The case does not hold, as the respondent represents, that "final oral argument after...

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<sup>4</sup>In United States v. Cronic, 466 U.S. 648 (1984), this Court cited Herring as an example of "constitutional error without [the need for] any showing of prejudice." Id. at 659, n. 25.



decision...can cure the due process violation." Counsel was there held to have waived final argument (Herring recognizes that waiver obviates any error) by not having requested final argument (a requirement of North Dakota law). Counsel also only wanted to bring certain legal authorities to the court's attention, was allowed to do so, hence there was no "denial of due process." Id. at 108. The case does not support the Massachusetts Supreme Judicial Court's attempt to avoid this "per se error."<sup>5</sup> Its decision is aberrational and "in conflict with decisions of this Court", "another state court of last resort...[and] federal court[s] of appeals." Rule 17.1(b) and (c). Hopefully, the Court can perceive that respondent's Brief In Opposition is a "sand in the air"

<sup>5</sup>North Dakota law in fact, recognizes the fundamental error here presented: "...litigants in civil nonjury cases...have a right to have their attorneys make a final argument...it cannot be totally denied." Fuhrman v. Fuhrman, 254 N.W. 2d 97 at 101 (N.D. 1977).



exercise--an effort to have the "per se error presented appear less stark than it actually is.

The unreality of any post-decision argument or "de facto review" curative was thusly recognized in People v. Dougherty, supra, at 280: "totally unrealistic....The bell having rung cannot be unrung (see The Rubaiyat of Omar Khayyam, stanza 72)."

Respectfully submitted,

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